APPENDIX

APPENDIX "A"

STATUTE INVOLVED

I. Section 3, First (i) through (r) of Railway Labor Act (45 U.S.C., Section 153, First (i) through (r)):

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such disputes must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee

within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such

order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board: *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for re-

view of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceedings to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of title 28, United States Code.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."

2. *Seventh Amendment to Constitution of the United States:*

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

APPENDIX "B"

Award No. 19389 of First Division of National Railroad Adjustment Board and Supporting and Dissenting Opinions

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was held.

Virtually identical issues involving these parties, arising at the same point on carrier's system, have been passed upon numerous times heretofore by the parties themselves in voluntary settlements of claims between them, by this Division, by an Emergency Board, and by a Special Board on the property.

This Division sustained the claim in Award 9357, without the aid of a Referee. In that docket there was singular recognition by the carrier that the claim was valid. A bulletin issued July 18, 1928, directing trainmen upon arrival at Burnham Terminal to cut the engine off the train, was withdrawn November 12, 1929; a new bulletin was posted November 17, 1930, and withdrawn December 11, 1930, with carrier's representative explaining that it "... should not have been issued"; instructions issued to trainmen in July, 1934, were withdrawn after a claim was filed, carrier's representative writing: "I am sorry that the original instructions put out some two or three years ago were overlooked and that this movement was again started. The practice was discontinued about August 20th or immediately after the cases came to my attention and I feel it will not again occur."

In almost the last paragraph of its submission therein, carrier said with candor: "It is true, however, that it had not been the practice for brakemen to take their engine to the cinder pit track on arrival, and when it became

known that a portion of General Order No. 46 provided for the brakeman to take their engine from Burnham Yard to the cinder pit track that portion was cancelled and the practice was discontinued effective August 26, 1937." Accordingly, this Division ruled unanimously: "By virtue of certain commitments in evidence on the part of representatives of respondent carrier it is held that claim asserted herein is valid."

However, a new claim arose subsequently, and in Case No. 20 of the Emergency Board it was sustained in 1946, the award reciting, "account brakeman required to herd engine from Round House to Depot Yard at Pueblo . . . Articles 9 (b), 71 of Trainmen's Schedule . . .".

Then, in Award 14631, with Referee Paul N. Guthrie assisting this Division on July 13, 1951, sustained another like claim, saying:

> "Petitioner contends that work performed by Brakeman Morgan violated the provisions of Article 9(b) of the relevant schedule wherein it is provided, in the absence of specific rules covering work performed in terminals, that customary practices will govern and shall not be extended. Facts of record, and not directly and specifically challenged by respondent, indicate that the work performed in the instant situation exceeded the practices followed in that terminal handling similar work. Therefore, a sustaining award is justified."

In that docket there again appears evidence of two settlements on the property sustaining similar claims, and this Division always attaches special significance to the interpretation the parties themselves may place upon the meaning of provisions in their own agreement.

However, Special Adjustment Board No. 12 on the property, denied a claim on June 23, 1952, and carrier naturally

relies heavily upon this, pointing out the serious consideration that a different ruling in the instant case might penalize it even though it was in compliance with an award of an authorized tribunal and was operating in accordance with such award. Nevertheless, it is inescapable that prior to the Special Board's decision there was unusual unanimity of precedent with respect to these same parties on the same issue at virtually the same point on the road.

In a statement elaborating upon the Special Board's award, the neutral member granted that a different result had been reached in settlements by the parties, an Emergency Board, and twice by this Division, but stated that "notwithstanding these facts, the carrier finally came to the conclusion that this interpretation was erroneous." It is an unfortunate concomitant, of course, of repeated submissions of the same issue that some inconsistency in interpretation may arise, and it is precisely this situation which impels this Division to follow the most consistent discernable course.

It may be that the Special Board was led to its conclusion by not having the advantage of availability of the full dockets before the Emergency Board, and this Division in connection with its Awards 9357 and 14631, because its award states that before those bodies "the derivation of Article 9 (b), its history and background as presented to this (Special) Board were not discussed;" whereas, specific reference thereto is made both in the award of this Division in 14631 and in Emergency Board Case No. 20.

Carrier also relies upon the agreement of the parties which withdrew Docket 26570 from the First Division and established the Special Board on March 24, 1952 providing that, "Such awards shall be final and binding upon both parties to the dispute." Important as consistency is, it must be observed, however, that unless they are grouped, each claim must be approached individually as an *ad hoc*

matter, and that the awards are indeed final and binding as to them, but not to all subsequent claims even of like nature. No formal doctrine of *stare decisis* ever evolved, even in the common law system of the Anglo-American courts, has become that rigid.

Along that same vein, however, it is to be noted that the instant docket reveals final handling on the property on December 22, 1952, after the Special Board had concluded its work, and bears the signed stipulation of the parties: "It was agreed in final conference December 20, 1952 this case would be submitted to N.R.A.B., First Division, or Special Board of Adjustment", so that even if a submission agreement were needed to present this question again, it would certainly be properly before this Division, and we must sustain the claim in view of all the foregoing.

AWARD: Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION
ATTEST: J. M. MacLeod
Executive Secretary

Dated at Chicago, Illinois, this 20th day of January 1960.

DISSENT OF CARRIER MEMBERS

Originally this dispute, with which we are here concerned, came into existence on August 21, 1949. On that date the Carrier put into service a new yard at Denver, Colorado, designated as the North Yard. Thereafter, all trains arriving Denver from Bond and Phippsburg terminated in this yard. The inbound road crew, after pulling into the yard, were required to dispose of their engine on a designated "tie-up track" located in the immediate vicinity of the east end of the yard. The handling of the engine, from the train to the tie-up track, is the matter

here in dispute. It was contended that the head brakeman, he being the only member of the train crew involved, was required to perform herder service in thus disposing of his engine. However, claims, for an additional day's pay, were advanced in favor of the Conductor and both Brakemen.

The above claims were denied by the Carrier, and were subsequently submitted to this Division (Docket 26570). Thereafter the Brotherhood of Railroad Trainmen petitioned the Carrier to establish a special system Board of Adjustment to handle this dispute and a large number of other pending disputes. The Carrier acceded to this request resulting in Special Board of Adjustment No. 12. In establishing this special Board, the parties entered into an agreement providing that the Board was created "for the purpose of disposing of pending time claims and grievances", and, it was also agreed that the awards of the Board would be "final and binding upon both parties to the *dispute*".

The dispute in Docket 26570, which was presented to and decided by Special Board of Adjustment No. 12, contained three contentions:

(1) A protest of the instructions issued by the Superintendent designating the two "tie-up tracks" and directing the employes that road engines would be placed on either of these two tracks. (Circular #425).

(2) A total of thirty specific claims for dates from Sept. 14, 1949 to and including Oct. 18, 1949.

(3) A further claim reading: "This appeal will cover all claims of crews on subsequent dates for a day's pay when head brakeman is required to herd engine from inbound train to service track in North Yard, Denver."

On June 23, 1952, Special Board of Adjustment No. 12 rendered a denial award* covering this dispute.

The present dispute (Docket 30812, Award 19389) is, and was recognized by this Referee to be, identical to that contained in Docket 26570, which was denied by Special Board No. 12. The fact that the present case contains six specific claims for dates in August 1952, subsequent to the award of the special Board, cannot change the nature of the dispute and should not have been used as an excuse to breath new life into an identical dispute, between the same parties, submitted by them to a Board of competent jurisdiction and disposed of by that Board. The matter was "res adjudicata", and, consequently, the present case should have been dismissed.

As before stated, this claim should have been dismissed. In failing to do so, this Referee committed a grievious error. Furthermore, in sustaining this claim, on its merits, equally serious errors are clearly apparent.

The Petitioner, in support of this claim, relies upon Article 9 (b) of the applicable agreement, reading:

"ARBITRARIES AND SPECIAL ALLOWANCES

"(b) Where no rules are in effect covering work performed at terminals, the practices in regard to the character of work permissible or duties required at terminals are not to be extended."

However, in the same applicable agreement, there is in effect a rule covering work performed at terminals, Article 15, reading:

"TERMINAL SWITCHING

"Trainmen in local or through and irregular pool freight service required to do terminal switching be-

* This award appears in Docket 30812 as Carrier's Exhibit C, and, consequently, will not become a part of this Division's printed award. Therefore, the award is attached to and made a part of this dissent.

fore departure or after arrival at terminals, will be paid for the actual time so used at pro rata rates on the minute basis.

"If road overtime computed from the time reporting for duty until final release produces the greater compensation, terminal time under this rule shall not apply and road overtime will be paid."

The petitioner contends that the placing of the engine on the "tie-up track" was work that should have been performed by herders. If that contention is correct, then the matter falls squarely under the provisions of Article 15. That rule does not support the claim for an additional day's pay. To the contrary, Article 15 provides pay for the actual time consumed on the minute basis and only under circumstances where road overtime is not involved. Referee Jackson, sitting on Special Board of Adjustment No. 12, recognized that petitioner's claim was not supported by the applicable rules, and, consequently, denied the claim. The present Referee apparently did not think that rules of the applicable agreement merited any consideration. It will be noted that his Findings make no attempt to interpret them.

Prior to May 1, 1945, the terminal switching rule (Article 15) was only applicable at certain specified points. It did not apply to Denver, the locale of the present claim. In the agreement of May 1, 1945, and in the subsequent agreement of February 1, 1952, the presently effective agreement, this rule was expanded to include all terminals, thereby making it applicable at Denver.

The awards relied upon by this Referee are all concerned with claims arising prior to May 1, 1945, and involved terminals, including Denver, which were not, at that time, covered by the terminal switching rule. Likewise, the disputes that were disposed of by the Carrier during the years of 1929, 1930, 1934, and 1937, quite obviously covered

matters arising prior to May 1, 1945. It is plainly evident, from the Findings, that the sustaining award here is based on these awards and settlement.

Referee Jackson, sitting on Special Board No. 12, recognized that there had been a significant and controlling change in the applicable agreements that demanded a denial award of the present dispute. However, Referee Sembower, in this award has conveniently ignored this important and controlling change in the effective agreement, between these parties, which was entered into on May 1, 1945. This is indeed strange, since Award 19372, Referee Sembower, B of R T vs D & R G W, contains the following statements in regard to this same agreement of May 1, 1945:

> "Prior to the agreement of May 1, 1945, Article 64 of the said agreement between the parties provided: 'In establishing new runs the proper general officer will notify the General Chairman of the Brotherhood of Railroad Trainmen and negotiate rates and conditions to cover the service. This rule not to prevent the railroad taking care of the demands of the service.'
>
> "A significant change was made May 1, 1945, so that the Article now provides: 'The Company is not prohibited by any Article or provision of this Agreement from establishing new runs, or new assignments.' Thus it is clear that the carrier had the authority to establish the new run herein.
>
> "However, in negotiating for a change in the said Article, the carrier on December 8, 1943, proposed also that language be included as follows: '. . . or from discontinuing or rearranging old assignments.' This was not incorporated in the revised Article, which in this respect remains unchanged.
>
> "The Division often has stated that to ask for a rule change is one of the best ways to indicate in the

party's own estimation that it is needed to supply the authority to do what the proposed language covers."

In that case he held that, since the Carrier did not obtain the desired change in the rules, the claim must be sustained. In the present case the Carrier did obtain the desired change. However, in this case that significant change is ignored, since, if it had been considered, this claim could not have been sustained.

The Findings and Award are so obviously erroneous that they cannot be permitted to pass unchallenged. Therefore, we dissent.

H. V. Bordwell

The undersigned concur:

E. T. Horsley
Geo. H. Dugan
H. W. Burtness
H. J. Reeser

APPENDIX TO DISSENT AWARD 19389

Award — Special Board of Adjustment No. 12
(Docket 26570)

In Case No. 26570 (withdrawn from the First Division), as a result of a merger of the Denver and Salt Lake Ry Company into the reorganized D & R G W, there was a coordination of facilities, operations and services, affecting among other things, yardmasters, switchmen, engine and train service employes entitled to work in the then separate terminals of Denver-Burnham (D&RGW) and Denver-Utah Junction (D&SL). Prior to August 21, 1949, the Carrier built a new yard (the north Yard) south of the old D&SL Denver-Utah Junction yard, and effective as of that date all trains departing for or arriving from the west were to depart from or arrive at the North Yard and upon arrival head brakemen were to place their engines

on the tie-up tracks. Inasmuch as this had not been the practice in the old Denver-Burnham yard, or in the old Denver-Utah Junction yard, claims were filed by train crews.

The basic issue in these twelve cases involves the interpretation of Article 9 (b) of the May 1, 1945 agreement (not applicable to conductors after June 1, 1950). Article 9 (b) has been in effect on this property since December 1, 1919. It should be noted here that all claims arose after May 1, 1945.

* * * * *

Shortly prior to December 1, 1919, the Director General of Railroads issued a memorandum under date of November 15, 1919, in which he stated as follows:

> "It seems to me that the best way to accomplish the giving of reasonable additional compensation to the employees in this slower freight service . . . is on the one hand to allow time and one half for over time, and on the other hand to cut out in all freight service all special arbitraries and allowances of every character, including initial terminal delays and final terminal delays. . . .
>
> "I am therefore willing to establish December 1, 1919, the time and one-half for overtime in road freight service provided the train and engine men will accept such a basis in lieu of all special allowances and arbitraries of every character and will do this for the railroads as a whole."

Apparently the train and enginemen engaged in road freight service would not accept the basis stated by the Director General inasmuch as the final rule, to be effective December 1, 1919, appeared as follows (Article X of Supplement No. 25 to General Order No. 27):

> "ARTICLE X — ARBITRARIES AND SPECIAL ALLOWANCES
>
> "(a) Excepting payments under rules applying to work performed at initial and final terminals, and to

final terminal delays, all arbitraries and special allowances applying to road service other than passenger, under rules, regulations, or practices, which conflict with the payment of single time, in miles or hours, from the time required to report for duty until released from duty at the end of the trip shall be eliminated.

"On roads where no rules are in effect covering work performed at terminals, the practices in regard to the character of work permissible or duties required at terminals are not to be extended.

"(b) Where the special payments under the rules, regulations, or practices which are retained under Section (a) have been allowed independently or separately from the trip, they will continue to be so allowed, but at the former rates."

Article X has been embodied verbatim under the heading "Arbitraries and Special Allowances" in all of the agreements (including the December 1, 1919 agreement) between the Carrier and the Brotherhood except that the second paragraph of Sub-Division (a), above, was marked in the agreement Sub-Division (b) and Sub-Division (b) above, was marked in the agreement Subdivision (c).

The Brotherhood argues that Article 9 (b) is general in its application and that in any case where an employe's duties are extended the rule is violated and the employes become entitled to an extra day's pay, citing in support of its position several awards of the First Division as well as the recommendations in some of the cases handled by the Emergency Board of July 10, 1946. The Carrier argues that the entire article must be read together and that when so read, Article 9 (b) is not applicable to the cases in Group 8 inasmuch as there is a rule (Article 15) applying to work performed at terminals. It points out that in Awards 1 to 10 of the First Division, employes at Ogden,

Grand Junction and Salida terminals were involved and that the switching rule* did not apply at these terminals at the time the claims there involved arose.

Article X of Supplement No. 25 to General Order No. 27 was enacted to provide greater compensation to certain train service employes in freight service by giving them time and one-half as overtime in exchange for the elimination of certain arbitraries and special allowances. While it is true that Supplement No. 25 did not purport to destroy—and never could have been supposed to have destroyed—seniority rights by authorizing the substitution of road men for yardmen, it is also true that Article X had no bearing upon—nor was it intended to affect—the duties normally and usually performed by brakemen.

It seems to us that the proper construction of Article X is that the second paragraph of subdivision (a) thereof would be applicable only on roads where there existed no rules applying to work performed at terminals. Article 15 of the May 1, 1945 agreement was in effect at the time these claims arose. That is a rule applying to work performed at initial and final terminals. Therefore, subdivision (b) of Article 9 of the Agreement does not apply.

Our conclusion is buttressed by the fact that on many properties where there were rules applying to work performed at terminals, some carriers and organizations

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* NOTE: Rules applying to work performed by freight crews at initial and final terminals have been in effect on this property at least since the 1908 agreement. But prior to May 1, 1945, special rates for switching were limited: In the 1908 agreement, to the El Moro, Trinidad, Minturn, Gunnison, La Veta and Chama Terminals; in the 1919 and 1926 agreements to the terminals previously mentioned, plus Ouray, Santa Fe, Green River, Helper and Soldier Summit; in the 1940 agreement to the same terminals, except that Bond was substituted for El Moro.)

agreed to eliminate the rules for freight road employes covering arbitraries and special allowances, made provision for the time and one-half referred to in Article X, and never included in the agreements the actual wording of Article X (a). This is true on this property with regard to the enginemen's and current conductors' agreements.

In support of their claims, the employes cited Awards 9357 and 14631 of the First Division, N R A B, and certain findings and recommendations of the Emergency Board of July 10, 1946. However, it appears from reading these awards, as well as the record in the Emergency Board proceedings that the derivation of Article 9 (b), its history and background as presented to this Board were not discussed.

Finally, it is to be noted that all these claims are for an extra day's pay. And yet the caption of the Article upon which the claims are based is entitled "Arbitraries and Special Allowanees." Certainly it cannot be argued that a claim for an extra day's pay is a claim for either an arbitrary or a special allowance.

Article 15 is a rule applying to work performed at initial and final terminals. As previously stated, it was in effect when these claims arose. We find that Article 9 (b) is not applicable to any of these cases. Since the Brotherhood places its chief reliance on that Article, our award is that these claims be denied.

SUPPORTING OPINION

The dissent charges the majority with error in sustaining the claim, giving reasons which are easily demonstrable as contrary to the weight of authority on this Division, with reference to each of them.

The record submitted shows that from prior to 1919, train crews were not required to render the service subject of claim—the accompanying of the road engine to the desig-

nated tie up track in Denver terminal, upon completion of the road trip. Numerous settlements by the parties, of which the respondent Carrier was one, repeatedly recognized this practice and the application of Article 9(b) to it. Article 9(b) contains this language:

> "Where no rules are in effect covering work performed at terminals, the practices in regard to the character of work permissible or duties required at terminals are not to be extended."

This is a standard provision, the meaning of which is well understood in the industry. The dissent appears to reflect a belief by the dissenters, that if any rule is in effect at terminals, Article 9(b) is not applicable. If so, this is in error. The rule means that where a given kind of work is to be done at terminals and there is no specific rule covering it, the prevailing practice as of the effective date of the rule (January 1, 1919) will control and it will not be extended. In this case, the practice was to not require train crews to render the service subject of claim and, under the rule, the work could not be exacted of the men without negotiation and agreement.

The agreement which was in effect on this carrier as of January 1, 1919, did contain rules pertaining to certain work performed at terminals. Article 27 provided that trainmen would not be required to couple air hose or test air at terminals where car men were employed. Article 29 provided for payment of terminal delay to passenger crews. Paragraph (a) of Article 9 itself, had reference to payments "under rules applying to work performed at initial and final terminals" and Article 15 covered "Switching performed by freight crews" at the terminals listed. Article 21 limited payment for "Terminal delays, switching and other arbitraries" to the extent set forth. Article 46 dealt with the responsibility of trainmen in seeing that their cabooses were properly equipped but relieved them

of the work of placing the supplies thereon. Article 51 relieved trainmen of going "under cars to adjust slack or piston travel, or to perform the duties of car men at points where car men are maintainded." It further provided: "At terminals where car men are employed they will close car doors" which meant that trainmen were relieved of that work at terminals. Other rules dealing with the work or duties to be performed at terminals are Article 55, 57, 60, 62, 63, 65 and 76.

None of the rules negotiated by this carrier specifically covered the work of accompanying engines at terminals. From this we find the parties with a contract containing 14 Articles dealing with work to be performed at terminals and the service of accompanying engines, under Article 9(b), to be continued in keeping with the practice in effect as of January 1, 1919.

Next, the record contained substantial probative evidence of agreement between the parties that the practice was to not require train crews to handle road engines to the designated tie up track upon arrival at Denver terminal. In view of the unrealistic nature of the dissent and its bland disregard for this evidence, a brief summary of it is in order:

Award No. 9357 involves these same parties and the performance of the identical work at Denver.

The submission of the employes in that case reflects that the trainmen were not required to render the service prior to July 18, 1928; that the carrier then extended their assignments to include it, in violation of Article 9(b) and claims were made. It is shown that after claims were filed and protest made, the instructions were cancelled and the claims withdrawn, November 13, 1929. A bulletin was again posted by the carrier November 17, 1930, exacting the work of the trainmen "to avoid delay in the break-up of trains arriving Burnham if the hostlers are not on hand to take charge of engine".

The employes protested this violation also, and on its being taken up on December 11, 1930, with the carrier, its Assistant General Manager R. F. Ray, stated: "Bulletin instructions of November 17th should not have been issued." The bulletin was not taken down and the matter was handled further. Under date of October 5, 1931, Mr. Ray acknowledged the impropriety of the work requirement and concluded by saying:

> "* * * If, however, it is your intention to hold me to my statement to Mr. Day the bulletin will be withdrawn."

Again, in July, 1934, the carrier imposed the work upon road trainmen in Denver; time claims were filed and on November 22, 1934, Assistant General Manager Ray said, in part:

> "ANSWER: I am sorry that the original instructions put out some two or three years ago were overlooked and that this movement was again started. The practice was discontinued about August 20th or immediately after the cases came to my attention and I feel it will not again occur. However, there is no basis under the rules for the claim for an additional day's pay which is therefore denied."

The next violation of the agreement occurred starting August 17, 1937, and this time the employes refused to be satisfied with cancellation of the instructions; they insisted that the claims be paid, progressing them to the First Division. The time claims were sustained in our Award No. 9357, without Referee assistance.

The next disposition shown in the record is that of Case No. 20, of Emergency Board Report dated August 14, 1946, in which the carrier was advised to allow the claim involved, quoted as follows:

"Your letter of July 5, File 555/6, appealing the following case to this office:

'Claim of Conductor D. W. Edgar, Brakemen M. N. Taylor and C. H. Shacklett for one day's pay each date April 25 and May 2, 1946, account brakeman required to herd engine from Round House to Depot Yard at Pueblo when called for a Soldier Train. Articles 9 (b), 71 of Trainmen's Schedule and Articles 2 and 3 of Switchmen's Schedule.'

"Claim will be allowed."

The employes reproduce material from Award No. 9524, T v D&RGW, decided without Referee assistance. It is there shown that prior to August 20, 1937, "crews assigned between Denver and Bond originated and terminated at Seventh Street Yard"; that on August 17, 1937, the carrier posted its General Order No. 46, reading, in pertinent part:

"Freight trains departing for and arriving from D. & S. L. will originate and terminate at Burnham Yard instead of 7th Street, Denver.

"Freight trains arriving from D. & S.L. will use C. & S. back lead from switch between 12th and 13th Streets to Burnham, this switch being controlled from Tower 'A' Denver Union Terminal. It will be necessary for trains using this track to obtain register check on first class trains between Denver and Burnham.

"Trains arriving from D. & S.L. will be stopped at 7th Street Yard, when necessary, for switch engine to remove Denver business, after which trains will proceed to Burnham."

In 1937 we find the carrier making a change of yards in Denver, where these road crews would begin and end their trips. Note that it was not then contended that this constituted establishing a new "terminal"; that it was recog-

nized for what it was—designating a new yard in which to tie up in an existing terminal—Denver being the terminal proper and the various yards being units of it. In the case at hand, the carrier tells us that placing the North Yard in operation was the equivalent of creating a new terminal, where prior practices were not to be honored. The unrealistic nature of that argument is attested to by the handling of the change of yards from Seventh Street Yard to Burnham Yard in August, 1937.

We have had a number of disputes submitted to us on the question of whether all yards within a terminal are a part of that terminal—i.e., that a terminal as such comprises all of the yards and facilities within its limits. A very recent award in point is No. 18851, C v CRI&P. In brief to the Referee, the Carrier Members said (page 5 thereof):

> "In Award No. 14944, CT v CMStP&P, we dealt with a road train crew's claim for an additional day's pay. In yarding their train at Mitchell, S.D., they operated over the main track of another seniority district. The Respondent asserted that '* * * the entire movement is within yard limits * * *.' Referee D. R. Douglass denied the claim, because:
>
> > '* * * the entire terminal may be used by employes from more than one seniority district. There is no agreement which would prevent these claimants from using any of the tracks within this terminal.'
>
> "In Award No. 15183, T v IC, road crews claimed an additional day's pay, contending they were required to 'go off their seniority district.' At their terminal, they yarded their train in a yard on another seniority district. The Respondent contended that '* * * a crew is not used outside its assigned limits when used on the tracks of another district within the station or switching limits of a point located on their own senior-

ity district.' Referee Coffey upheld the Respondent's position, and denied the claims, because:

'Petitioner's complaint is that the local crews were run off their seniority district when required to go to North Jackson instead of originating and terminating at a different point in the Jackson terminal known as "West Yard".

'It appearing that North Jackson and West Jackson are parts of the same terminal and all tracks traversed being within the terminal limits, the facts of record and schedule of rules do not uphold the claim.'

"See also Awards Nos. 15293, 16560, and 16937, of like import."

Referee Sembower denied the claim and in his findings, said:

"As a conductor with seniority on the Des Moines Valley seniority district, the claimant had the right to handle the train in question through Altoona. Altoona is a station which is common territory for conductors of both seniority districts involved, and we have held that where an entire terminal is used by employes from more than one seniority district, in the absence of any agreement to the contrary, there is nothing to prevent employes from using any of the tracks within such a terminal. Awards 14944, 15183. Accordingly, this claim must be denied."

Reverting to Award No. 9524: the submission of the carrier shows that the change in yards in August of 1937 was the same as that accomplished with the opening of the North Yard in 1949:

"Prior to June 15, 1934, the Rio Grande operated trains in its mainline service only between Denver and

Pueblo and beyond Pueblo. Effective June 15, 1934, mainline operations were inaugurated between Denver and Bond and beyond Bond over the joint line with the Denver and Salt Lake Railroad. This new mainline service resulted in a material decrease in the mainline mileage for business between Denver and points west of Grand Junction to Salt Lake and beyond to California. The opening of the new cut-off line resulted in an increase in thru business, also the diversion of some business from the old main line through Pueblo, necessitating enlargement of terminal yard facilities at Denver. When service via the joint line was started June 15, 1934, enlargement of the Yard at Burnham had not been completed.

"During the initial period of the new operation from June 15 to August 20, 1937, freight trains departing from and arriving at Denver over the D. & S. L. joint line were made up and departed from or were received in the downtown or 7th Street Yard. Effective August 20, 1937, with completion of additional yard facilities at Burnham and as provided in General Order 46, which reads as follows; freight trains arriving at and departing from Denver via the joint line originated and terminated at the Burnham Yard, passing by 7th Street Yard enroute out of or into the Denver terminal."

At page 9 of the pamphlet copy, the carrier recites a history of similar operational changes at Salt Lake City:

"Similarly at Salt Lake City, for many years the 6th South Street or downtown yard was the point at which all road trains east and west between Salt Lake and Helper or Soldier Summit were assembled or yarded. With increase of thru traffic, particularly coal from the vicinity of Helper, Utah, it became necessary to provide additional yard tracks at that point and

they were located at Roper, some 2.8 miles east of the 6th South Street yard."

This much serves to establish the fact that the engine handling subject of claim was never part of the terminal work of the train crews at Denver, whether the carrier designated 7th Street Yard, Burnham Yard or North Yard as the tie up yard. Also, that each time the carrier ventured to make it a part of their work, the action was protested, claims were filed and the carrier acknowledged the impropriety of its conduct.

The carrier alleges that an agreement entered into at the time the North Yard was placed in operation, accepted it as a new "terminal"; that prior to the issuance of Bulletin Number 151, a conference was held with the Local Chairmen at which the parties thoroughly discussed the method of handling trains there and no protest was made "to any provision of Bulletin Number 151."

In the first place, as pointed out by the petitioner, any understanding or agreement having the effect of interpreting or applying rules of the agreement must be handled in accordance with Article 91—with the General Chairmen, and not with the Local Chairmen. In the second place, an agreement with reference to switching limits, which is the subject of the understanding actually reached with the Local Chairmen, has no bearing on the amount or nature of the work to be done at North Yard, under Article 9(b). In the third place, the argument of the carrier that there were no practices in effect at Denver in so far as the North Yard was concerned, when that yard was placed in operation, is nonsense. We have already seen how two Prior changes were made in the tie up yards at Denver itself and at Salt Lake, without any such position being taken by the carrier. It is furthermore, a simple matter of fact, that the work involved remained constant—the tieing up of trains in Denver Terminal as a whole; that when the

same work was transferred from 7th Street Yard to Burnham Yard in 1937 and from Burnham Yard to North Yard in 1949, the antecedents peculiar to its performance at Denver Terminal, attached to it in the same way it had ever since 1919; the locale of its performance would not alter nor affect application of the rules.

Next, note that the statements of the carrier to the effect that the men did not protest the nature of the bulletin prior to its posting, are followed by the reason why no exceptions were taken to the requirement that the train crews handle the engine to the tie up track. It is said:

> "* * * The bulletin did not specifically say brakemen would handle road engines on inbound trains to tie-up track at the North Yard but did state tie-up track would be designated * * *".

Naturally, it was assumed that when the work was being transferred from Burnham Yard to North Yard in circumstances where it had long been recognized that it was in violation of Article 9(b) to require road train crews to handle their engine to the tie up track, that the picture was not to be changed without negotiation and agreement; that assumption would be strengthened, not weakened, by covering the subject in bulletin 151 when it was posted, August 15, 1949, without mentioning or implying that the work was to be shifted to the train crews. Other evidence in the record shows that the carrier did not exact the service of the train crews after Circular #425 was posted, August 24, 1949, and then did so initially by verbal instructions. The violations were discontinued January 17, 1950, by the posting of Circular #36 and Circular #53, whereby the switch handling involved was to be done by switchtenders.

As indicated, the men filed claims for performing the work during the period the instructions were in effect, con-

tending that prior settlements, particularly First Division Award No. 9357, supported them.

The carrier denied the claims and they were submitted to the First Division, Docket No. 26570. The case was withdrawn and presented to the Special Board on the property. The agreement establishing the Special Board, gave its decisions the same effect as Awards of the First Division under the Railway Labor Act. That is, the particular decision would be final and binding on the parties as to that particular dispute, or claim. (Paragraph J). The Board's authority was limited by Paragraph H:

> "The Board * * * shall not have authority to change existing agreements governing rates of pay, rules and working conditions."

A copy of the decision handed down by Referee Andrew Jackson on the time claims covering the period from August 1949 until the violation was ended by the assignment of switchtenders in January, 1952, is attached to the dissent. The enormity of his miscarriage is apparent to the reader. The employes bitterly protested and Referee Jackson wrote them, giving his reasons for denying the claims:

> "* * * Granted that there were several settlements made on the property which in effect confirmed your construction of Article 9(b). Granted that two awards of the First Division, as well as the recommendations and findings of one Emergency Board, also sustained your position. Notwithstanding these facts, the Carrier finally came to the conclusion that this interpretation was erroneous, after studying the derivation and history and background of Article 9 and has tried to have what in its opinion is the proper interpretation placed upon this article. * * *"

From this it is apparent that his decision was calculated simply to set aside all the evidence in the case for the

purpose of granting to the railroad, "what in its opinion is the proper interpretation" to be placed upon Article 9 from that time forward.

The volume of authority we could cite, to convince the reader that Special Boards and the First Division are without jurisdiction to grant a revision of a schedule rule in the guise of interpreting it; to disregard all the evidence in the case in the process of doing so, would require many additional pages if treated in detail. The proper coure of action for the carrier to have followed was to have negotiated with the employes in an attempt to secure a revision of the agreement; so long as the rule remained in effect and had been interpreted and applied by the parties in the manner shown, it was the function of the Referee to apply it to the claim before him.

Upon receipt of Referee Jackson's decision, the carrier gleefully hastened to abolish the positions of switchtenders and to transfer the work of handling the road engines to the trainmen again.

The employes promptly filed and progressed time claims for each date of the renewed violation, commencing with August 7, 1952, submitting them to the First Division in this Docket, No. 30812.

We have given the substance of the case before us in the above summary. It was upon this record that we refused to follow the errors of Referee Jackson's Special Board decision. We are satisfied that the reader will easily see the soundness of the findings and award made and agree with us that the time claims were valid for the reasons given.

We will now take up the dissent of the Carrier Members and prove lack of basis for each criticism voiced.

The dissent begins by treating the time claims denied by Referee Jackson and those sustained in Award No. 19389 as comprising a single dispute which it is implied, was disposed of by the Special Board. The reasoning em-

ployed is that once a time claim is submitted requiring application of a given rule to a set of facts, a dispute arises and when that dispute is decided, the decision rendered disposes of any future similar or identical case. This is nonsense.

Both, carriers and employes, have brought subsequent similar or identical claims to this Division down through the years, seeking an award overruling an earlier one which is alleged to be erroneous. We have agreed in a substantial number of our awards that this was so and rendered findings and awards overruling previous decisions demonstrated to be erroneous. A few of our more recent awards overruling prior awards are: 16021 overrules 11468; 16461 overrules 16448; 16482 overrules 16408; 17377 overrules 16806; 17780 overrules 12989; 19248 overrules 14477 and 19263 overrules 18039. We have for the same reasons, refused to accept and follow System or Special Board Decisions when presented with evidence of error in their holdings or where we know that they are contrary to the weight of authority here. What better reason for rejecting the decision of Special Board No. 12 in this case, than found in Referee Andrew Jackson's own statements, above quoted? The Carrier Members themselves have resisted application of a Special Board Decision if they thought it erroneous or inconsistent with First Division holdings on the same principle. Some of our latest Awards where we rejected Special or System Board decisions are Nos. 14627, 17330, 17459, 18502, 19150, 19152, 19271, 19272, 19273 and 19274.

If we were to take the dissenter's position on this point at face value, then we nullify Referee Jackson's own award for the reason given by the dissenter in impeaching No. 19389. The record of handling engines at Denver shows a line of settlements between the parties, wherein the carrier repeatedly confessed error on its part and promised to mend its way. These in turn were followed by subsequent violations and resultant time claims until the men

insisted that those filed for the violations perpetrated on and after August 21, 1937, must be paid. The carrier, while conceding the fact of violation, declined the claims as being without schedule support and, in Award No. 9357, the First Division, without Referee, sustained them. Now, if we were to accept the theory advanced in the dissent, that we have here, one DISPUTE comprising time claims submitted in blocks when the carrier is guilty of repeating the violation, then we have First Division Award No. 9357 sustaining identical claims for the performance of the work at the same terminal—Denver—and when the violation was repeated by the carrier during the period from August 1949 to January 17, 1950, the carrier and Referee Jackson should have paid those claims under authority of Award No. 9357 which had already disposed of the "dispute". Instead, the carrier refused to comply with and follow Award No. 9357. Referee Jackson also did so. When the claim covered in Docket No. 30812 was submitted here, the dissenter would not take his own medicine nor was he agreeable to applying the principle he has concocted as a basis for impeaching the soundness of the findings and award rendered by the majority which, in the final analysis, has only done what he himself advocates as just and proper.

The theory of the dissent, that the "dispute" is a broad class case consisting of blocks of time claims submitted from time to time, and that all of them are automatically denied by simply invoking the decision of Special Board No. 12, is dissipated by the simple fact that such "settlement" of the "dispute" was reached by the Division, without Referee assistance, on May 9, 1944, more than 8 years before Referee Jackson jettisoned everything that had gone before, and denied the patently valid claims, because he thought he ought to give the carrier a fresh start, free from its own repeated interpretations of the rules.

Next, the dissenter mentions, with an inuendo of disapproval, that the claims cover full crews. The Petitioner

cited rules from the agreements in his submission, which supported the claim as made and buttressed this with settlements on the property, evidencing understanding between the parties, that the entire crew was entitled to the same payment as a unit. There is no basis for criticism in this regard.

The dissenter cavils at the findings for rejecting Article 15, the Terminal Switching rule, as one "covering work performed at terminals" within the meaning of Article 9(b). It is strange, if this rule meant what is now said of it, that the carrier did not so contend when it was made effective in 1945 instead of first alleging it did when seeking desperately to escape its claim liability in 1952. In many prior cases decided by the First Division, the Carrier Members have alleged that the service of handling road engines by trainmen comes within the beginning and ending of a day rule, not under the terminal switching rule. In award No. 9447, involving these same parties (also see No. 9499) it was held by the Division, with Referee: "* * * moving car or cars from one track to another is construed as switching * * *". Recent Awards Nos. 17816 and 19316 rejected claims based on a contention that similar handling of road engines constituted switching moves. In contrast, awards where the claims were for additional compensation for trainmen required to handle engines in violation of a rule such as Article 9(b), sustained the claims—see Nos. 15393 and 15915. On this very property, (in addition to Awards Nos. 9357 and 19389) we sustained similar claims in Award No. 14631. The distinction between them and cases involving bona fide terminal switching is readily apparent.

A considerable portion of the dissent is devoted to the history of Article 15 and its revisions down through the years, but the rule speaks for itself. It is impossible to read into the present Article 15, anything which will support the proposition that it authorized the carrier to make the handling of road engines at Denver, part of the duties

of the road train crews. The carrier did not act upon any such theory when Article 15 was revised in 1945 nor has it at any time, instructed the men doing the work to claim payment under the terminal switching rule when required to handle their engines in 1949 and again in 1952. It is obvious to the fair-minded reader that this is a make-weight argument, advanced for lack of any other. Furthermore, if the position of the carrier and the dissenter were correct in this respect, then Article 9(b) would have clearly been in mind when the parties negotiated the revision to Article 15 and, if those revisions had the meaning now attributed to them, the parties would have unequivocally agreed to eliminate Article 9(b) from the printed schedule when it was reissued. In short, no action of any kind was taken after revision of Article 15 indicating the slightest thought that it was to have the meaning and application now imputed by the dissenter.

It is impossible to make this portion of the dissent remotely plausible. The reader will surely agree that the practices at terminals within the scope of Article 9(b), which are involved in this award, were in no way affected by Article 15 or its revisions from time to time. It is equally apparent that all of this germinated in the mind of the carrier officer when frantically seeking a basis for declining the valid claims. Repeating these empty assertions and allegations in the dissent cannot give substance to them; shadows they were and shadows they remain.

Nothing in the dissent establishes error in the findings or award. They are unaffected by it.